NAVEEN RAJ NAIDU GUNASEGARAN v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NOS: B-05-134-05-2013 & B-05-135-05-2013]
23 MARCH 2015

CRIMINAL PROCEDURE: *Trial – Pre-trial conference – Procedure – Agreement to dispense with presence of chemist at trial – Whether accused persons participated in pre-trial conference between prosecution and counsel – Whether matters agreed upon reduced into writing and signed by accused persons, counsel and prosecution – Whether non-compliance curable – Criminal Procedure Code, ss. 172A(5) & 422*

CRIMINAL PROCEDURE: *Trial – Case management – Agreement to dispense with presence of chemist at trial – Chemist report served on counsel during case management – Whether service effected on accused persons – Whether accused persons' written consent obtained for admission of chemist report during case management – Whether proviso to s. 399(1) of Criminal Procedure Code complied with – Whether non-compliance occasioned in failure of justice – Criminal Procedure Code, ss. 172B(2)(iv), (6) & 422*

EVIDENCE: *Exhibit – Admissibility of – Chemist report – Agreement to dispense with presence of chemist at trial – Chemist report served on counsel during case management – Whether accused persons' written consent obtained for admission of chemist report during case management – Whether chemist report correctly admitted – Whether proviso to s. 399(1) of Criminal Procedure Code complied with – Whether agreement between parties supersedes written law – Criminal Procedure Code, ss. 172A(5), 172B(2)(iv), (6) & 422*

The appellants were the first and second accused in the High Court who had been charged for trafficking in 1,834g of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952. The trial judge found that both appellants had acted in concert in trying to sell cannabis and that there was direct evidence of possession and trafficking of the dangerous drugs. The trial judge found the appellants' defence to be an afterthought and they were thereupon convicted and sentenced to death. Hence, these appeals which were heard together. It was apparent from the judgment of the trial judge that the chemist was not called to testify, as during case management, it was agreed between the prosecution and defence counsel that the presence of the chemist be dispensed with. Due to the agreement between the parties, the chemist report was admitted by the trial judge and marked as exh. P7 during case management and tendered during trial through the investigating officer. The first appellant submitted that unless there was evidence that the first appellant agreed to the dispensation of the chemist, the chemist report remained inadmissible. The prosecution conceded that there was non-

compliance with ss. 172A and 172B of the Criminal Procedure Code ('CPC'), but contended that the service of exh. P7 was properly done on the basis that the defence counsel had taken no objections on the manner it was served during case management and had not objected to the non-calling of the chemist during trial. The prosecution also submitted that s. 399 of the CPC had been complied with as exh. P7 was tendered more than ten days before the commencement of the trial. It was the prosecution contention that the error in the admission of exh. P7 could be regularised under s. 422 of the CPC. The issue for the court's determination was whether, in the absence of the written consent of the appellants as to the dispensation of the chemist, the appellants were bound by the agreement between the defence counsel and the prosecution during case management and whether such an agreement superseded the express provisions of the law.

Held (allowing appeals; setting aside order of conviction and sentence of High Court against both appellants; and ordering retrial before another High Court Judge)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Although a copy of exh. P7 was tendered to defence counsel during case management, its service was never effected on the appellants. While the defence counsel agreed with the dispensation of the chemist, the written consent of the appellants in respect of the dispensation was absent. The admission of exh. P7 during the case management was similarly without the written consent of the appellants. (para 18)

(2) It is settled law that the proviso to s. 399(1) of the CPC is a condition precedent and if not complied with, the chemist's report could not be admitted in evidence without calling the government chemist to produce it. The provisions in ss. 172A and 172B on the pre-trial conference and case management were also provisions that ought to be strictly followed by the court, as the court are governed by the specific provisions of the sections. (paras 21, 22 & 23)

(3) Section 422 of the CPC can be invoked in the instances where the non-compliance was in respect of the procedural matters, whereas in the instant appeal, the concern was not merely procedural. Without exh. P7, there was no evidence on cannabis, the dangerous drug which was the very subject matter of the charge (*Nobies Weah Ezike v. PP*, dist). (paras 26 & 27)

(4) Notwithstanding the agreement of or waiver by defence counsel during case management, exh. P7 was found to have been wrongly admitted and could not be cured under s. 422 of the CPC. The agreement of the prosecution and the defence counsel could not derogate from the application of s. 172A(5) of the CPC and s. 172B(2)(vi) and (6) of the CPC and, especially in criminal matters, no default by the defence or waiver or agreement by the parties could supersede the written law. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu merupakan tertuduh pertama dan kedua di Mahkamah Tinggi yang telah dipertuduh bagi pengedaran 1,834g kanabis, satu kesalahan yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952. Hakim bicara mendapati bahawa kedua-dua perayu telah bertindak secara bersama dalam percubaan untuk menjual kanabis dan bahawa terdapat keterangan langsung milikan dan pengedaran dadah berbahaya. Hakim bicara mendapati bahawa pembelaan perayu-perayu adalah fikiran kemudian dan dengan itu mensabitkan dan menjatuhkan hukuman mati. Oleh itu, rayuan-rayuan ini yang dibicarakan bersama. Adalah jelas daripada penghakiman hakim bicara bahawa ahli kimia tidak dipanggil untuk memberikan keterangan, kerana semasa pengurusan kes, telah dipersetujui antara pihak pendakwaan dan peguam pembelaan bahawa kehadiran ahli kimia boleh diketepikan. Disebabkan oleh perjanjian antara pihak-pihak, laporan ahli kimia diterima masuk oleh hakim bicara dan ditandakan sebagai eks. P7 semasa pengurusan kes dan dikemukakan semasa perbicaraan melalui pegawai penyiasat. Perayu pertama menghujahkan bahawa melainkan terdapat keterangan bahawa perayu pertama bersetuju dengan pengenepian ahli kimia, laporan kimia tersebut kekal tidak boleh diterima. Pihak pendakwaan mengakui bahawa terdapat ketidakpatuhan ss. 172A dan 172B Kanun Tatacara Jenayah ('KTJ'), tetapi menghujahkan bahawa penyerahan eks. P7 telah dibuat dengan sewajarnya atas dasar bahawa peguam pembelaan tidak membuat apa-apa bantahan terhadap cara ia diserahkan semasa pengurusan kes dan tidak membantah kegagalan memanggil ahli kimia tersebut semasa perbicaraan. Pihak pendakwaan juga menghujahkan bahawa s. 399 KTJ telah dipatuhi kerana eks. P7 telah dikemukakan lebih daripada sepuluh hari dari tarikh permulaan perbicaraan. Pihak pendakwaan juga menghujahkan bahawa kesilapan dalam penerimaan masuk eks. P7 boleh dibetulkan di bawah s. 422 KTJ. Isu untuk pemutusan mahkamah adalah sama ada, tanpa persetujuan bertulis perayu-perayu berkaitan dengan pengenepian ahli kimia, perayu-perayu terikat dengan perjanjian antara peguam pembelaan dan pihak pendakwaan semasa pengurusan kes dan sama ada perjanjian sedemikian menggantikan peruntukan undang-undang yang jelas.

Memutuskan (membenarkan rayuan-rayuan; mengenepikan perintah sabitan dan hukuman oleh Mahkamah Tinggi terhadap perayu-perayu; dan memerintahkan perbicaraan semula di hadapan Hakim Mahkamah Tinggi yang lain)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Walaupun sesalinan eks. P7 dikemukakan kepada peguam pembelaan semasa pengurusan kes, penyerahannya tidak pernah dibuat kepada perayu-perayu. Walaupun peguam pembelaan bersetuju dengan

pengenepian ahli kimia, persetujuan bertulis perayu-perayu berkaitan dengan pengenepian tersebut tiada. Penerimaan masuk eks. P7 semasa pengurusan kes adalah juga tanpa persetujuan bertulis perayu-perayu.

(2) Adalah undang-undang matan bahawa proviso kepada s. 399(1) KTJ adalah pra-syarat dan jika tidak dipatuhi, laporan ahli kimia tidak boleh diterima masuk sebagai keterangan tanpa memanggil ahli kimia kerajaan untuk mengemukakannya. Peruntukan-peruntukan ss. 172A dan 172B berkaitan dengan mesyuarat pra-perbicaraan dan pengurusan kes adalah juga peruntukan-peruntukan yang sepatutnya dipatuhi secara ketat oleh mahkamah, kerana mahkamah dikawal selia oleh peruntukan-peruntukan spesifik seksyen-seksyen tersebut.

(3) Seksyen 422 KTJ boleh dibangkitkan dalam keadaan di mana ketidakpatuhan tersebut adalah berkaitan dengan perkara-perkara prosedur, manakala dalam rayuan ini, pertimbangannya bukanlah prosedur semata-mata. Tanpa eks. P7, tidak ada keterangan berkaitan kanabis, dadah berbahaya yang merupakan perkara pertuduhan tersebut (*Nobies Weah Ezike v. PP*, dibezakan)

(4) Walaupun terdapat perjanjian atau penepian oleh peguam pembelaan semasa pengurusan kes, eks. P7 didapati telah diterima masuk secara salah dan tidak boleh dibetulkan di bawah s. 422 KTJ. Perjanjian pihak pendakwaan dan peguam pembelaan tidak boleh menjejaskan pemakaian s. 172A(5) KTJ dan s. 172B(2)(vi) dan (6) KTJ dan, khususnya dalam perkara-perkara jenayah, tiada keingkaran oleh pembelaan atau penepian atau perjanjian oleh pihak-pihak yang boleh menggantikan undang-undang bertulis.

Case(s) referred to:
Fan Yew Teng v. PP [1971] 1 LNS 29 FC ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(refd)***
Nobies Weah Ezike v. PP [2010] 1 CLJ 578 CA ***(dist)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 172A(5), 172B, 399(1), 422
Dangerous Drugs Act 1952, s. 39B(2)

(Criminal Appeal No: B-05-134-05-2013)
For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Samihah Rhazali; DPP

(Criminal Appeal No: B-05-135-05-2013)
For the appellant - T Vijayandran; M/s T Vijay & Co
For the respondent - Samihah Rhazali; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-66-04-2012]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] Both the appeals were heard together. The appellants were the first and the second accuseds respectively in the High Court at Shah Alam. They were charged for trafficking in dangerous drugs, to wit, 1834g of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

The Prosecution's Case

[2] Inspector Saravanan a/l Diwanantong (SP2) had received information from one of his registered informers of a person by the name of Naveen peddling in drugs. The informer had given the details of the mobile number of Naveen. SP2 sprung into action. He appointed L/Kpl Kamarudin bin Mohd Latiff (SP1) to be the agent provocateur. In the presence of SP2, SP1 made a call to the mobile number and spoke to a person who admitted to be Naveen. A meeting was agreed to take place on the same day at 8.30pm at a stall near Crystal Crown Hotel in Port Klang.

[3] At this meeting attended by SP1 and Naveen (identified as the first accused/appellant), SP1 expressed his desire to purchase 2kg of cannabis. After negotiation, the price was fixed at RM5,000 per kilogram. The first appellant was to call SP1 once the supply of the cannabis was available.

[4] On 18 January 2012, SP1 received a call from the first appellant. SP1 was informed that supply was available. SP1 and the first appellant agreed to meet at a place called Restaurant Yunus. SP2 decided to be an additional agent provocateur by bringing the money. On reaching the designated place, SP1 went to meet the first appellant in the restaurant while SP2 remained in the car.

[5] At the restaurant the first appellant intimated to SP1 that the drugs will arrive shortly. Meanwhile SP1 brought the first appellant to the car to meet SP2. SP1 introduced SP2 to the first appellant as his partner. A short while later another person (identified in court as the second accused/appellant) came to the place where the first appellant and SP1 were standing, talking to SP2. The first appellant introduced the second appellant as his friend. The second appellant sat in the car with SP2 and had asked to see the money. The second appellant had also asked to count the money. SP2 refused. SP2 asked for the drugs to be shown first. Thereupon the second appellant asked SP2 to drive him to the place where he had parked his motorcycle which was at a short distance away.

[6] On reaching the place where the motorcycle was parked, the second appellant got down from the car followed by SP2. The second appellant took a newspaper package from the motorcycle. At this point of time, the appellants were apprehended.

[7] The contents of the newspaper package confirmed by the chemist to be cannabis, the subject matter of the charge.

[8] The learned trial judge found that both the appellants had acted in concert in trying to sell cannabis and that there was direct evidence of possession and trafficking of the dangerous drugs.

The Defence

[9] In their evidence given under oath, the narration of events led by the prosecution was not denied by the appellants except insofar as the purpose of the meeting was concerned. It was the defence version that the purpose of the meeting was for the appellants to get a temporary job. For the second appellant, he had stated that the drugs were planted in his motorcycle rack.

[10] The learned trial judge found that the defence was an afterthought and was nothing more than the appellants' desperate attempt to escape the gallows. The appellants were convicted and sentenced to death, hence the appeal.

The Appeal

[11] We decided the appeal on only one issue submitted by learned counsel for the first appellant, which submission was adopted by learned counsel for the second appellant. The issue concerned the admissibility of the evidence that the subject matter of the charge was cannabis, a dangerous drug.

[12] Relevant to the issue is s. 399(1) of the Criminal Procedure Code (CPC) which provides:

> Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person ... shall be required to attend as a witness:
>
> (a) by the Court; or
>
> (b) by the accused, in which the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it **to the accused** not less than ten clear days before the commencement of the trial. (emphasis added)

[13] In the instant appeal, what transpired was evident from the following judgment of the learned trial judge (rekod rayuan, jld 3: p. 564):

> A final point meriting attention was the contention of the counsel of the 1st accused that the chemist report in this case should not have been considered as it had not been served on the accused 10 days before the trial. The defence counsel forgot that on the day of the case management

before me 1 month before the trial he had not only confirmed he had a copy of the chemist report but had clearly informed the court that he did not require the chemist to testify as he was not challenging the report. This later submission was clearly unethical in the face of his earlier agreement. The chemist report was properly tendered during trial through the investigating officer.

[14] Apparent from the above judgment that the chemist was not called to testify, as during case management, it was agreed between the prosecution and defence counsel that the presence of the chemist be dispensed with. And due to the agreement between the parties, the chemist's report was admitted by the trial judge. It was marked as exh. P7 during case management (rekod rayuan tambahan 2: p. 5) and tendered during trial through the investigating officer, Inspector Billy Stephen (SP3).

[15] It was the submission of learned counsel for the first appellant that unless there was evidence that the first appellant agreed to the dispensation of the chemist, the chemist's report remained inadmissible. Learned counsel relied on ss. 172A and 172B of the CPC.

[16] For ease of reference, we set out below the said provisions:

172A. Pre trial conference

(1) An accused who is charged with an offence and claims to be tried shall, by an advocate representing him, participate in a pre-trial conference with the prosecution before the commencement of the case management.

(2) ...

(3) ...

(4) During the pre-trial conference, an advocate representing an accused may discuss with the prosecution the following matters relating to the case:

(a) identifying the factual and legal issues;

(b) narrowing the issues of contention;

(c) clarifying each party's position;

(d) ensuring the compliance with section 51A;

(e) discussing the nature of the case of the prosecution and defence, including any alibi defence that the accused may rely on;

(f) discussing any plea bargaining, and reaching any possible agreement thereto; and

(g) any other matters as may be agreed upon by the advocate representing the accused and the prosecution that may lead to the expeditious disposal of the case.

A (5) All matters agreed upon in the pre-trial conference by the advocate and the prosecution shall be reduced into writing and signed by the accused, the advocate and the prosecution.

172B. Case management

B (1) A Magistrate, Sessions Court Judge or Judge of the High Court, as the case may be, shall commence a case management process within sixty days from the date of the accused being charged and claims to be tried.

(2) At the case management, the Magistrate, Sessions Court Judge or Judge shall:

C (i) ...

(ii) ...

(iii) ...

(iv) ...

D (v) ...

(vi) subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits; and

(vii) ...

E (3) ...

(4) ...

(5) ...

(6) Notwithstanding the provisions of the Evidence Act 1950, all F matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under subsection 172A(5) shall be admissible in evidence at the trial of the accused.

[17] For the prosecution, learned Deputy Public Prosecutor (DPP) conceded that there was non-compliance with ss. 172A and 172B of the CPC. G However, she argued that service of the chemist's report was properly done, on the basis that defence counsel had taken no objections on the manner the chemist's report was served during case management and had not objected to the non-calling of the chemist during the trial. Further, learned DPP submitted that the requirement under s. 399(1) of the CPC had been H complied with, since the chemist's report was tendered more than ten days before the commencement of the trial. It was thus the submission of learned DPP that the non-compliance had not occasioned a failure of justice and that the non-compliance could be rectified by s. 422 of the CPC.

Our Findings

I

[18] It was common ground that while a copy of the chemist's report, exh. P7 was tendered to defence counsel during case management, service of exh. P7 was never effected on the accused persons/appellants. It was also

common ground that while defence counsel agreed with the dispensation of the chemist, the written consent of the appellants in respect of the dispensation was absent. The admission of exh. P7 during case management was similarly without the written consent of the appellants.

[19] With the above background, the issue for our determination was whether, in the absence of the written consent of the appellants as to the dispensation of the chemist, the appellants were bound by the agreement between the defence counsel and the prosecution during case management and whether such an agreement superseded the express provisions of the law.

[20] Learned DPP contended that since the appellants were represented by counsel, it was the duty of counsel to object to the admissibility of the chemist's report or to give notice to the prosecution for the chemist to testify, which counsel had not done either.

[21] It stood to reason that since defence counsel was representing the appellants, whatever that was agreed to by learned counsel in the case management must have been upon the instructions or with the agreement of the appellants. We accepted that as a general scenario. In the instant appeal however, we are governed by the specific provisions of ss. 172A and 172B of the CPC.

[22] Apart from ss. 172A and 172B, we have s. 399(1) of the CPC. It is settled law that the proviso to s. 399(1) of the CPC is a condition precedent and if not complied with, the chemist's report cannot be admitted in evidence without calling the government chemist to produce it (see *Ooi Lean Chai v. Public Prosecutor* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337; [1991] 2 MLJ 552).

[23] Coming back to ss. 172A and 172B, it was our view that the provisions on the pre-trial conference and case management as provided under the said sections are provisions that ought to be strictly followed by the court. Where the language used in a statute is clear and unambiguous, the meaning must be accepted by the court. Once the literal meaning has been established, however inconvenient such meaning may be, it must receive its full effect (see *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685).

[24] Subsection (5) of s. 172A stipulates that whatever matters agreed to by the prosecution and the defence must be agreed upon in writing by the accused. Subsection (2)(vi) of s. 172B provides that the admission of any exhibits is subject to the consent of the accused and his advocate while sub-s. (6) states that matters that have been reduced into writing and signed by the accused, his advocate and the prosecution under sub-s. 172A(5) shall be admissible in evidence at the trial of the accused.

[25] Learned DPP cited the case of *Nobies Weah Ezike v. PP* [2010] 1 CLJ 578 in support of her proposition that the error in the admission of the chemist's report can be regularised under s. 422 of the CPC. In particular, she highlighted the following passage in the judgment of Court of Appeal:

A [9] We accept that the learned trial judge fell into error when he took into consideration the guest registration card (ID39), the payment receipt (ID52), the fax message to Thailand (ID51), the customs declaration (ID6E), and the UPS pack (ID6A). But we could not allow the appeal merely on account of the fact that the learned trial judge had taken into consideration that which he, with respect, should not. For a start, s. 422(c) B of the Criminal Procedure Code provided that the finding, sentence or order passed by a court of competent jurisdiction shall not be reversed or altered on account of the improper admission or rejection of any evidence, "unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice". Then again, s. 167 of the Evidence Act which provided that "The improper admission C or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that, if the rejected evidence had been received, it ought not to have varied the decision. ... D

[26] In *Nobies*'s case, the trial judge admitted and considered the exhibits which were not yet properly admitted in evidence. Since it should not have been considered, the Court of Appeal ruled that the prosecution's case had to stand without those exhibits. Considering the oral testimony of the E witnesses and the properly admitted exhibits, the Court of Appeal found that the prosecution had more than proved beyond reasonable doubt, the ingredients of the offence of trafficking in dangerous drugs. In the instant appeal, we were concerned with the chemist report, without which, there was no evidence on cannabis, the dangerous drug, the very subject matter of the charge. That, in our view, set the instant appeal and *Nobies*'s case apart. F

[27] On the application of s. 422, we were of the view that the section can be invoked in instances where the non-compliance were in respect of procedural matters whereas in the instant appeal, the concern was not merely procedural. We found support in the judgment of the Supreme Court in *Ooi Lean Chai, (supra)* at p. 340 (CLJ); pp. 553-554 (MLJ): G

> Learned counsel for the appellant referred us to the case of *PP v. Lim Chen Len*, where Mohamed Azmi J (as he then was) held at p. 42:
>
> > In *Chong Yik v. PP*, Storr J held that the proviso to s. 399(i) of the Criminal Procedure Code is a condition precedent and, if not H complied with, the report of the government chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongful admission is an illegality which cannot be cured under s. 422 of the Criminal Procedure Code. Similarly, in *Wong Kok Keong v. R*, Spencer Wilkinson J, in dealing with s. 427(1) of the Straits Settlement Criminal Procedure Code (Cap 21), which was in *pari* I *materia* with s. 399(i), held the view that the provisions related to evidence rather than procedure. ...

> With respect, I agree that the provision of s. 399(i) of the Criminal Procedure Code relates to admissibility of evidence and is not merely procedural.
>
> We agreed that s. 399(i) of the CPC was not merely a procedural provision but it contained, *inter alia*, rules of admissibility of chemist's report which dispensed with the need to call the government chemist as maker of the document as witness. ...

[28] In the light of all the above, notwithstanding the agreement of or waiver by defence counsel during case management, we found that the chemist's report, exh. P7 was wrongly admitted, which wrongful admission could not be cured under s. 422 of the CPC. The agreement of the prosecution and the defence counsel cannot derogate from the application of sub-s. (5) of s. 172A and sub-ss. (2)(vi) and (6) of s. 172B of the CPC and, especially in criminal matters, no default by the defence or waiver or agreement by the parties can supersede the written law (see *Fan Yew Teng v. PP* [1971] 1 LNS 29; [1971] 2 MLJ 271, see also *Kiew Foo Mui & Ors v. PP* [1996] 1 CLJ 14; [1995] 3 MLJ 505).

[29] We therefore allowed the appeals. We set aside the order of conviction and sentence of the High Court against both the appellants and we ordered a retrial before another High Court Judge at Shah Alam.